

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

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Vantiv LLC

DECISION OF THE HEARING OFFICER

Appearances: Nancy Oliver, Esq., representing Vantiv LLC

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay/paid time off pay (PTO)
RSA 275:44 IV liquidated damages

Employer: Vantiv LLC, 8500 Governors Hill Drive, Symmes TWP, OH 45249

Date of Hearing: June 18, 2014

Case No.: 47613

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts she is owed \$1,999.92 in unpaid wages for vacation pay. She had accrued one hundred and four hours of vacation pay which should have been paid to her at a rate of \$19.23 per hour upon her resignation from the employer. She argues upon consulting an attorney, they advised her that the employer was required to pay her for vacation pay pursuant to RSA 275:43 VII (b)(3). She also consulted legal websites that stated New Hampshire employees must be paid for their vacation time upon separation. She also noted she did contact this Department, however, the Labor Inspector she spoke with “was vague” in explaining whether or not an employer has to pay out vacation pay/PTO pay. She further argues that past employees in Massachusetts and Kentucky have received vacation pay, even if they have been terminated.

She argues that she did not receive her final compensation of bonus/incentive/commission until January 3, 2014, when it should have been paid with her final wages in December 2013. She further seeks liquidated damages for this issue.

The employer denies the claimant is due any further wages. The vacation policy reads, in relevant part, “Employees who have provided notice of their resignation of employment are not eligible for any paid time off during their notice period, to include floating holidays or accrued PTO.” Further, “Termination of Employment – Except when otherwise required by law:

- Accrued but unused PTO is forfeited upon separation from employment.”

The employer also argues the claimant was paid her bonus/incentive/commission as provided in the written policy as follows, “Payment Frequency – Monthly; the 1st pay period of the 2nd month following the end of the commission period or as soon as practical thereafter.” The November 2013 payment was made on January 3, 2014.

The employer also testifies that they believed they had the ability to pay the bonus/incentive/commission on the regular schedule as that plan is not the same as her salary/wages, which they paid within the requirement of RSA 275:44 II. If it is found they did not pay within the required time frame for the bonus/incentive/commission, they argue it was not willful and without good cause.

FINDINGS OF FACT

The claimant worked for the employer for almost four years until she resigned in December 2013. The employer paid the claimant a biweekly salary for which she was fully compensated.

The claimant argues she provided a two week notice of her intention to resign her employment and was then informed she could not use her vacation pay/Paid Time Off (hereafter PTO) during her notice period and that she would not receive her accrued PTO upon separation. She argues that employees in Massachusetts and Kentucky received vacation pay/PTO even though some of them were terminated. She alleges it is discriminatory for the employer to pay employees in other states and not to pay her.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding vacation pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer provided the claimant with an electronic version of the employee handbook. The employer required the claimant to electronically acknowledge receipt of the handbook which she did. The claimant did not read the handbook even though she acknowledged the employer that she had done so.

The employer provided credible testimony that they had never paid a New Hampshire employee for vacation pay/PTO pay upon separation.

The employer had a written policy which reads, in relevant part, “Employees who have provided notice of their resignation of employment are not eligible for any paid time off during their notice period, to include floating holidays or accrued PTO.” Further, “Termination of Employment – Except when otherwise required by law:

- Accrued but unused PTO is forfeited upon separation from employment.”

The employer properly notified the claimant of their policy regarding vacation pay/PTO, as required by RSA 275:49. Nothing in the statute requires an employer to pay vacation pay/PTO pay to a separated employee. The statute only requires that an employer notify an employee, in writing, as to how the program works, including how they receive the benefit and how the benefit is treated upon separation. The employer met their burden.

The claimant's argument that the employer paid vacation pay/PTO pay to employees in other states is not persuasive. Each state or commonwealth has a different set of laws as to how the employees in their jurisdiction must be treated regarding vacation pay/PTO pay. The employer's policy clearly states, "Except when otherwise required by law" regarding the vacation/PTO policy. The employer's written policy is compliant with New Hampshire statutes.

The claimant's argument regarding RSA 275:43 VII (b)(3) is irrelevant. This statute does not apply to vacation pay/PTO pay. This statute specifically speaks to compensatory time that is offered in lieu of pay for time worked to government employees and certain public sector employees under a collective bargaining agreement.

RSA 275:43 V states, Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, **when due**. In light of the written policy of the employer, the vacation pay/PTO pay does not become due and is subsequently not considered wages in this instance.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed vacation pay/PTO pay under the employer's valid written policy.

The claimant argues the employer willfully and without good cause did not pay her bonus/incentive/commission with her final wages pursuant to RSA 275:44 II. The employer paid the bonus/incentive/commission on January 3, 2014, the regularly scheduled payment date for the program for November 2013. She seeks liquidated damages on these wages.

The employer argues they paid the claimant pursuant to the written policy, as follows, "Payment Frequency – Monthly; the 1st pay period of the 2nd month following the end of the commission period or as soon as practical thereafter." The November 2013 payment was made on January 3, 2014.

The employer further argues they believed they had the ability to pay the bonus/incentive/commission on the regular schedule as that plan is not the same as her salary/wages, which they paid with the requirement of RSA 275:44 II. They argue it was not willful and without good cause.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean,

"voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The New Hampshire Supreme Court, in Bryan K. Galloway v. Chicago-Soft, Ltd. 142 NH 752, established a "general rule" regarding commission sales that states, "a person employed on a commission basis to solicit sales orders is entitled to his commission when the order it is accepted by his employer. The entitlement to commissions is not affected by the fact that payment for those orders may be delayed until after they have been shipped. This general rule may be altered by a written agreement by the parties or by the conduct of the parties which clearly (*emphasis in original*) demonstrates a different compensation scheme".

The Hearing Officer finds that the general rule was altered by written policy of the employer regarding the bonus/incentive/commission plan. Therefore, the payment was due on the regularly scheduled pay schedule, not within the requirements of RSA 275:44 II.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay all wages due within the required timeframe as the employer altered the general rule and properly notified the claimant of the alternation. Further, the employer held a genuine belief that the wages were not payable until January 3, 2014.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

/s/

Melissa J. Delorey
Hearing Officer

Date of Decision: June 26, 2014

Original:
cc:

Claimant
Employer

MJD/clc